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No. 85-1116

In the Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CITY OF OCEANSIDE, CALIFORNIA AND 74 JOINING CALIFORNIA CITIES IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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BRIEF OF AMICI CURIAE CITY OF OCEANSIDE, CALIFORNIA AND 74 JOINING CALIFORNIA CITIES IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

This Brief is filed pursuant to Rule 36.4 of this Court.

STATEMENT OF THE CASE

Amici Curiae, the City of Oceanside, *et al.*,[1] adopt in full the Statement of the Case made by Appellants, the City of Whittier, *et al.* (hereinafter "Whittier").

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[1]Appendix A hereto sets forth those California cities joining in this Brief.

INTERESTS OF THE AMICI

Whittier's adult business regulations, which are the subject of this appeal, are by no means unique. Many California cities have been impacted with the secondary effects of adult businesses. In light of this Court's opinion in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), most of these cities have adopted ordinances regulating the location of adult businesses in an attempt to control the associated secondary effects.

The need of California cities to legislate for legitimate governmental interests is being frustrated by the Ninth Circuit, as demonstrated by its decision in this case. The secondary effects of concentrations of adult businesses include increased crime, lowering of property values and harmful effects on children. These are all legitimate significant interests which cities are required to address by use of their police powers. As this Court has noted, the exercise of reserved police powers by a city,

> "is not confined to the elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

Orderly planning is vital to California cities. Each city is required to prepare a General Plan regulating all future growth within the city. Cal. Gov't Code §§ 65300-66403.

The Ninth Circuit has systematically invalidated adult business regulations. The court has required these type of regulations to jump hurdles which are faced by no other legislation involving First Amendment rights. Because the Ninth Circuit has elevated the rights afforded

to adult businesses over all other land uses, including general audience theaters, California cities, as represented by *Amici*, have been unable to fulfill their obligations toward their citizens.

Amici are particularly concerned because this case involves a "secret" opinion of a federal court overruling a published and presumably reliable California appellate court decision. Conventional wisdom is that the Ninth Circuit's unpublished opinion affects only the parties in the case. *Amici* dispute this contention. While *Amici* have strong concerns in general concerning decisions not to publish opinions, they are particularly concerned in this case because the Ninth Circuit's opinion has left California cities unable to rely upon the final published decisions of their own State appellate courts.

It is unusual for a Ninth Circuit opinion as lengthy as the one in this case to go unpublished. A recent study indicates that almost 85% of Ninth Circuit unpublished opinions are less than 500 words in length. Reynolds & Richmond, *An Evaluation of Limited Publication in The United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 599 (1981). Professors Reynolds and Richmond suggest three pertinent reasons why this Court should be concerned over the Ninth Circuit's decision not to publish its opinion in this case. First, judicial responsibility "may be diminished if courts use the non-publication list as a respository [sic] for troublesome cases presenting issues the court does not wish to address in public." *Id.* at 581. Second, "non-publication may permit judges to approach their jobs more routinely, without the real thought and effort their precedential decision making requires." *Id.* Finally, because an unpublished opinion is less likely to be reviewed by this Honorable Court, "a court of appeal that recognizes this may avoid review of its decisions

by not publishing them." Reynolds & Richmond, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1203 & n.175 (1978).

It should be noted that the Ninth Circuit determined that the issues presented by ordinances regulating the locations of adult businesses were sufficiently important that the three other such cases considered by the court over the last two years were published. *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985); *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348 (9th Cir. 1985); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir.), *probable juris. noted*, ___ U.S. ___, 105 S.Ct. 2015 (1984). It should also be noted that Whittier made a formal request, pursuant to Rule 21(d) of the Ninth Circuit, to have the court's opinion published (Appendix B hereto), which is unusual for a losing party, but the panel denied the request (Appendix C hereto).

Cities across California, as represented by *Amici*, are of the firm opinion that this Court should consider the appeal by Whittier in order to correct a dangerous trend in the Ninth Circuit and other lower federal courts to severely curtail the zoning power to regulate the location of adult businesses, and to instruct the lower federal courts on the need to respect state court processes.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Ninth Circuit panel did not follow California law when it refused to give preclusive effect to the decision of the California Court of Appeal in *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983). The appellate court decision held Whittier's regulations to be facially valid, and remanded the case on only the question of whether the

ordinance failed to provide for sufficient alternative locations for adult businesses, and was therefore unconstitutional as applied. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981). The Ninth Circuit's failure to respect this decision of a state appellate court enables entrepreneurs like Walnut to have two opportunities, one in federal court and one in state court, to have an ordinance or statute held unconstitutional. Such an outcome should not be countenanced in our federalist system.

2. This case also is an appropriate case for abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. Because the California Legislature has mandated that cities adopt zoning plans to protect their citizens' health, safety and general welfare, regulation of the location of adult businesses clearly "implicates important state interests." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The state court proceeding, involving the same parties and identical issues as this case, was filed two years before the federal case. In that the state proceedings here commenced before the federal proceedings, and the state court proceedings offer an adult business an adequate opportunity to raise all federal constitutional challenges, abstention is clearly warranted. The federal court's failure to abstain in this case is contrary to the principles of equity, comity and the doctrine of federalism. Moreover, refusal by the federal courts to abstain in this case would sanction tactics by which businesses such as Walnut can forum-shop for the court most favorable to their claims.[2]

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[2]This is not the only case where Walnut has employed this tactic. *See Walnut Properties, Inc. v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, *cert. denied*, 449 U.S. 836 (1980); *Walnut Properties, Inc. v. Long Beach*, No. 81-942-LJH (C.D. Cal. 1981), *aff'd.*, No. 81-5732 (9th Cir. 1982).

3. The Ninth Circuit held Whittier's regulations invalid because it found "*a* motivating purpose" for their enactment was to suppress constitutionally protected speech. In so holding, the court ignored the results of a seven month study demonstrating serious deleterious effects caused by the concentration of adult businesses in Whittier. Courts should not speculate as to legislative motive, as this is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). This is particularly true in this case where the Ninth Circuit based its finding of improper motive on a statement made three years after the adoption of the regulations by a city employee, not a legislator, in a deposition.

4. The Ninth Circuit did not allow Whittier to rely on the extensive experience of other cities in enacting its adult business regulations. Moreover, the court found that the City had presented "no evidence" that it had a legitimate interest in adopting the regulations, despite the fact that a seven month study was conducted which demonstrated that significant secondary effects existed within Whittier, because of the concentration of thirteen adult businesses.

Amici submit that sufficient studies of secondary effects caused by concentrations of adult businesses have been conducted by cities and communities in the United States so as to make these deleterious effects a matter which can be judicially noticed. This Court should not require cities to "reinvent the wheel" to demonstrate that there is a legitimate need to adopt regulations to reduce the secondary effects caused by concentrations of adult businesses. *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 455, 187 Cal.Rptr. 154, 158-59 (1982).

5. The Ninth Circuit found that there were inadequate alternative sites for adult businesses to locate

within Whittier. In so doing, the court held that the City was required to allow adult businesses to locate in the City's central business district, despite the fact that no other First Amendment protected activities are given such a privilege. Moreover, the Ninth Circuit granted Walnut more than equal protection, in that by finding that no alternative sites existed due to the assumption that landlords would be unwilling to rent to an adult business, the court made Whittier responsible for market forces which are beyond its control.

This case presents substantial issues as to the need to instruct the federal judiciary to respect both state judicial processes and legislative processes. It is deserving of a full review before this Honorable Court.

ARGUMENT

1. THIS CASE DEMONSTRATES AN ABUSE BY THE FEDERAL COURTS OF THE CONCEPTS OF EQUITY, COMITY AND FEDERALISM

A. The Decision Below Is Contrary To The Doctrines Of Res Judicata And Collateral Estoppel.

On April 30, 1979, Whittier filed an action for injunctive relief against Walnut in California Superior Court. Whittier sought by this action to abate the use of the Wardman Theatre, owned by Walnut, as an adult business. Walnut's use of the Theatre was made a nonconforming use by adoption of Whittier's adult business regulations. Following the expiration of the amortization period, which reflects the property owner's investment in the nonconforming use, Whittier had issued an order of abatement, and the state action followed to enforce this abatement order by injunction.[3] This case wound its way through the Superior Court, the Court of Appeal, the California Supreme Court, and finally back to the Court of Appeal, which on December 8, 1983, published an opinion holding the regulations facially valid. *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983). Walnut's petition for rehearing in the appellate court was denied January 3, 1984, and its petition for a hearing by the California Supreme Court was denied

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[3]California cases "have firmly held zoning legislation may validly provide for the eventual termination of nonconforming property uses. . . ." *Castner v. City of Oakland*, 129 Cal.App.3d 94, 96, 180 Cal.Rptr. 682, 684 (1982) (court approved amortization period to terminate nonconforming adult entertainment use); *see also National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 880, 464 P.2d 33, 39, 83 Cal.Rptr. 577, 582 (1970); *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 453, 274 P.2d 34, 41 (1954).

February 2, 1984. *Id.* at 649, 197 Cal.Rptr. at 137. Walnut did not seek review of the court's decision before this Court.

Judgment in the federal district court was not entered until March 8, 1984, well after the state court decision was final.

The California Court of Appeal was forced to remand the case for further proceedings, because the trial court, in holding the regulations facially unconstitutional, did not address two issues, although testimony was proffered. Because the trial court had failed to decide the issue of the availability of other areas in which adult businesses might be operated (an "as applied" issue), "the matter [was] remanded for a hearing and determination on that issue." *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d at 642, 197 Cal.Rptr. at 133.

In addition, the case was remanded to determine whether Walnut operated an "adult theatre" within the meaning of Whittier's regulations. Because the trial court had found the regulations facially unconstitutional, it did not make a finding on this issue, and under then California law, the failure to make such a finding required the case to be remanded.[4] On all other issues, the appellate court made final rulings.

Despite the state appellate court's opinion, the Ninth Circuit held that the doctrine of res judicata was inapplicable since the case was remanded for trial.

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[4]The appellate court's decision makes it clear what finding the trial court must make. It states: "[o]n the record the only finding could be adverse to respondent [Walnut], but it is entitled to have one made. On remand, the trial court shall make the required finding." *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d at 643, 197 Cal.Rptr. at 134.

However, California law holds otherwise.[5] In ruling that no final judgment exists whenever an appellate court orders a case remanded, the Ninth Circuit elevated form over substance, contrary to California law. *Stromer v. Browning*, 268 Cal.App.2d 513, 518-19, 74 Cal.Rptr. 155, 160 (1968). When read as a whole, the clear intent of the California appellate court was to decide all issues before it except for the two issues remanded. Under California law, the opinion of the Court of Appeal is res judicata, even though a limited rehearing was ordered. *Beverly Hills Nat. Bank v. Glynn*, 16 Cal.App.3d 274, 288, 93 Cal.Rptr. 907, 915-16 (1971).

The cases cited by the Ninth Circuit are not to the contrary. *NAACP v. Los Angeles Unified School District*, 518 F.Supp. 1053, 1058 (C.D. Cal. 1981), *rev'd on other grounds*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2398 (1984), quotes from *Stromer v. Browning*, wherein the court states that "the fact that the rule we discuss is a 'general' rule implies that it has limitations." 268 Cal.App.2d at 518, 74 Cal.Rptr. at 158. The other case cited by the Ninth Circuit, *Aurora City v. West*, 74 U.S. (7 Wall.) 82 (1868), in fact supports Whittier's position. The Court's decision only restates the common law rule that a final judgment must exist for a decision to be a bar of a subsequent action, and that "where the action was discontinued, or the plaintiff became nonsuit, or where from any other cause, except perhaps in the case of a *retraxit*, no judgment or decree was rendered in the case, then proceedings are not conclusive." *Id.* at 93 (footnote omitted). Because there is a final judgment of a state

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[5]Federal courts must give the California appellate court's opinion the same preclusive effect as would be given the opinion under California law. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

appellate court, which has preclusive effect under California law, Whittier is correct in asserting that res judicata applies.

Moreover, the decision of the California Court of Appeal must be given preclusive effect under the doctrine of collateral estoppel or issue preclusion.[6] In *Sandoval v. Superior Court,* 140 Cal.App.3d 932, 190 Cal.Rptr. 29 (1983), the court held that a decision may be "final" for issue preclusion purposes even though it is not final for res judicata or claim preclusion purposes. *Id.* at 936, 190 Cal.Rptr. at 31. The court stated that:

> "for purposes of *issue preclusion* (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be *sufficiently firm to be accorded conclusive effect." Id.* (emphasis in original) (quoting from Restatement (Second) of Judgments, § 13 (1982)).

The court endorsed the reasoning of the Restatement that:

> "To hold invariably that that kind of carry-over is not permitted until a final judgment in the strict sense has been reached in the first action can involve hardship—either needless duplication of effort and expense in the second action to decide the same issue. . . ." *Id.*

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[6]In discussing collateral estoppel, or issue preclusion, *Amici* are not enlarging the issues before this Court. Appellants' "Questions Presented" expresses the issue before the Court as one of whether "preclusive effect" should be given where a state appellate court's published decision is final before the federal district court enters its judgment. Jurisdictional Statement at *i.* As this Court has often noted, the terms res judicata and collateral estoppel have conflicting definitions, and it is thus better to use the term preclusive effect. *See, e.g., Migra,* 465 U.S. at 77 n.1.

In holding that the California Court of Appeal's published decision has no preclusive effect, the Ninth Circuit ignored the clear intent of the state court opinion, and in effect rendered six years of litigation null and void. This Honorable Court should accept jurisdiction in this case to clarify this misapplication of California law and avoid the double litigation which the Ninth Circuit's decision will otherwise engender.

B. The Federal Courts' Failure To Abstain Is Inconsistent With The Doctrine Of *Younger v. Harris.*

The federal district court held that abstention was not warranted in this case. App. 84a. This holding is inconsistent with this Honorable Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny.

In *Younger*, this Court stated that federal interference with on-going state criminal proceedings violates not only traditional notions of equity, but also the,

> "even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, in a continuance of a belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for a lack of a better and clearer way to describe it, is referred to by many as 'our Federalism.' " *Id.* at 44.

The *Younger* abstention doctrine has subsequently been extended to on-going state civil proceedings which involve important state interests.[7]

[7] *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977);

Under the test enunciated by this Court in *Middlesex County*, there is no question that this is an appropriate case for *Younger* abstention because the issues "implicate important state interests." *Middlesex County*, 457 U.S. at 432. Whittier has a recognized obligation to its citizens which requires it to regulate the location of adult businesses within the City. *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976); *Central Avenue News, Inc. v. City of Minot, N.D.*, 651 F.2d 565, 568 (8th Cir. 1981). Moreover, the state court litigation was on-going prior to filing of the federal action, and Walnut had the opportunity in the state action to raise all of its federal claims (and in fact raised each of the issues which were relitigated in this case). "No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327, 337 (1977).

2. THE NINTH CIRCUIT HAS ERECTED THREE VIRTUALLY INSURMOUNTABLE BARRIERS TO ZONING ADULT BUSINESSES

A. Statements By Whittier's Planning Director Are Insufficient To Demonstrate That Whittier's Regulations Were Adopted To Suppress Protected Speech.

The Ninth Circuit based its holding of improper motivation upon deposition testimony given by Mr. Porter, the City Planning Director. App. 8a. However, review of Mr. Porter's deposition testimony indicates that the line of questioning was not concerning motive, but rather the justification for the provision.[8] The district

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Moore v. Simms, 442 U.S. 415 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

[8]The following portions of Porter's deposition were read into the record at the trial:

court clearly held that this deposition testimony went to the issue of justification, and not to the issue of motive. App. 39a-40a.

"Question: What is the justification, if any, for prohibiting an adult theater within a thousand feet of a church?

Answer: I would say a church – reasons of peace and quiet of the church activities, separation of the religious activities from other activities that could have a conflict.

Question: What kind of conflict?

Answer: Moral conflict.

Question: What are those two philosophies that might come in conflict?

Answer: Pro-adult business and adverse to an adult business.

Question: But what has that got to do with the church? I'm missing it. I'm sorry.

Answer: Churches are usually – are opposed to adult businesses because of the moral aspect.

Question: When you say 'moral aspect,' what moral aspect?

Answer: Perhaps I don't know quite how to answer that.

Question: Well, you're doing okay. Just give me your best answer.

Answer: Well, most churches are against the display of the human body or for anyone that wants to view the human body in acts. And of course, the other side of the fence is that those that feel it's all right, or wish to – particularly wish to view, or the act or an act.

Question: Is it fair to say, then, that the reason, the justification for having a separation of a thousand feet between an adult theater and a church is to protect the sensitivites of the religious people who attend the churches?

Answer: I think both sides.

Question: Pardon?

Answer: In fact, both sides.

Question: When you say 'both sides,' first answer my question. The answer to my question is 'yes', is that correct?

Mr. Porter's deposition statements were to the effect that allowing church uses near adult business uses would lead to a situation where "[t]here could be incompatibility. Close proximity could cause conflict between the two philosophies, the uses." RT at 91, lines 13-15. In so stating, Mr. Porter was merely echoing the statement by this Court that:

> "Plainly schools and churches have a valid interest in being insulated by certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and *there could be little doubt about the power of a state to regulate the environment in the vicinity of* schools, *churches,* hospitals, and the like by exercise of reasonable zoning laws." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (emphasis added).

Answer: Yes.

Question: Now, when you say 'both sides,' what do you mean?

Answer: I would say those that frequent the adult business may have certain sensitivies [sic] with the close proximity of a church.

Question: And what do you base that on?

Answer: Just experience.

Question: What experience?

Answer: About 27 years of planning experience.

Question: And in that sense, you found people who attend adult theaters are offended if there is one within a thousand feet of a church. Is that what you are telling me?

Answer: Quite possible, yes.

Question: Anything is possible. Do you think it's probable?

Answer: Yes, I do." Reporter's Transcript ("RT") at 90-93.

Porter's cited statement as to the justification for the separation between adult businesses and churches, far from being evidence of an improper motive, is merely a restatement of a principle subscribed to by eight members of this Court in *Grendel's Den*. It is a statement of fact, and not an indication of a motive to suppress protected speech on the part of any councilmember of Whittier.

B. Despite This Court's Decision In *Young*, The Ninth Circuit Has Refused To Recognize That Adult Business Regulations Are Adopted To Serve Legitimate Interests.

The Ninth Circuit in this case held that the City offered "no evidence" that it had an important or substantial governmental interest in regulating the location of adult businesses. App. 6a. The requirement of evidence of an important or substantial government interest, which has been developed from Justice Powell's concurring opinion in *Young*, is unnecessary, but in any event was amply satisfied in this case.

In *Young*, four Justices of this Court found sufficient reason to enact the ordinance in question based upon findings of the Detroit Common Council, a police department memorandum, and "the opinion of urban planners and real estate experts who supported the ordinances." 427 U.S. at 54-55. Similar evidence exists in this case, and *Amici* submit that this is sufficient justification for the regulations.

The concurring opinion of Justice Powell did not disagree with the plurality on the question of justification. The concurrence stated "it is clear beyond question that the Detroit Common Council had broad regulatory power to deal with the problem that prompted

enactment of the Anti-Skid Row Ordinance." *Id.* at 74. Justice Powell further stated:

> "Nor is there doubt that the interests furthered by this ordinance are both important and substantial. Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most central function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' " *Id.* at 80 (citation omitted).

The Court's decision in *Young*, coupled with the large number of studies of secondary effects of adult businesses which have been conducted by cities in the United States, suggest that the secondary effects associated with the establishment of adult businesses within a city are a matter which should be judicially noticed. In the absence of evidence to the contrary, courts should assume that cities have a legitimate governmental interest in adopting ordinances regulating the location of adult businesses. This Court should not require repetitive investigations in communities sharing similar problems. *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 455, 187 Cal.Rptr. 154, 158-59 (1982).

As this case demonstrates, the Ninth Circuit has coupled its requirement of a full independent and

repetitive investigation with a policy to reject any reasonable attempts to perform such a study. Whittier performed a seven month study which documented the significant secondary effects that existed within the City, which included massive increases in crime; harassment of citizens, including children; and a decrease in property values coupled with a negative impact on Whittier's efforts to improve the economic base of the City through redevelopment. App. 119a. The Ninth Circuit appears to have held that Whittier was required to justify its governmental interest by reference to Walnut's Theatre alone. This is contrary to long-held precedent of this Court, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926), and grants Walnut with more protection than provided to general release theaters.

Furthermore, the plurality in *Young* indicated that the type of speech regulated by Detroit's ordinance is entitled to less protection than other forms of speech. 427 U.S. at 65-69 (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). Since the decision in *Young*, this Court has held that the governmental interest in the "well-being of its youth" justifies special treatment of indecent but non-obscene radio broadcasts received by adults as well as children (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)) and, in reviewing a statute outlawing distribution of material depicting sexual performances by children under the age of sixteen, this Court stated that it would not "second-guess" the legislature's findings (*New York v. Ferber*, 458 U.S. 747, 757-58 (1982)). In that Whittier's regulations are designed, in part, to protect children from exposure to material of a frank sexual nature (*see* App. 126a-27a), and since the speech of adult businesses such as Walnut is low "in the

heirarchy of First Amendment values" (*FCC v. Pacifica Foundation*, 438 U.S. at 746), this Court should reverse the Ninth Circuit and find Whittier's regulations adequately justified.

C. The Ninth Circuit Has Required That Cities Provide Adult Businesses With More Than Equal Protection By Invalidating Regulations On The Assumption That Landlords Are Unwilling To Rent To Such Businesses And By Requiring Every Portion Of A City To Be Open To Such Businesses.

The Ninth Circuit found that Whittier's regulations do not by themselves ban adult theaters from the City, but that the reluctance of a shopping center owner to lease to such a theater combined with the unlikelihood of an appropriate vacancy "will probably have the same effect." App. 7a. The Ninth Circuit made this conclusion without any evidence on the record to support the assumption that a shopping center owner would be less likely to lease to an adult theater than any other type of theater.

Whittier cannot be held respnsible for market conditions which are beyond its control. There is no argument but that ordinances such as the type approved by this Court in *Young* may result in economic hardship.

> "Nortown [an adult theater] concededly will not be able to exhibit adult movies at its present location, and the ordinance limits the potential location of the proposed Pussy Cat [another adult theater]. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic

> detriment as a result of land-use regulation. *The cases are legion that sustained zoning against claims of serious economic damage. See, e.g., Zahn v. Board of Public Works*, 274 U.S. 325, 71 L.Ed 1074, 47 S.Ct. 594 (1927)." *Young*, 427 U.S. at 78 (Powell, J., concurring) (emphasis added).

In addition, the Ninth Circuit found Whittier's regulations unconstitutional because they made it "impossible to operate [an adult business] in the central business district." App. 7a. In so ruling, the Ninth Circuit apparently held that there is a constitutional requirement that an adult business be permitted to locate in any district of the City which it desires. As five members of this Court stated in *Young* on this point:

> "First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street." 427 U.S. at 57 n.13 (quoting from *Nortown Theatre v. Gribbs*, 373 F.Supp. 363, 371 (E.D. Mich. 1974)).

Similarly, Walnut does not have an absolute right to operate in the City's central business area, in which a large number of other uses, including First Amendment uses such as theaters, live entertainment and churches, may not operate as a matter of right. Such a rule would grant adult businesses more than "equal protection."

CONCLUSION

Based upon the foregoing, this Court should undertake a full review of all of the facts and issues involved in the matter of the validity of Whittier's adult business zoning regulations, not only for the purpose of correcting the errors made by the lower federal courts in this litigation but to instruct these courts on the need for respect of the decisions made through state judicial processes, and to restate its decision in *Young* on the latitude available to cities in their attempt to "experiment with solutions to admittedly serious problems." 427 U.S. at 71.

Respectfully submitted,

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APPENDIX A

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APPENDIX B

May 28, 1985

Honorable Phillip B. Winberry
Clerk of the Court
United States Court of Appeal
Ninth Judicial Circuit
7th and Mission Streets
San Francisco, CA 94103

Re: *Walnut Properties, Inc. v. City of Whittier*
Nos. 84-5755 and 84-6087

Dear Mr. Winberry:

The undersigned, on behalf of the Defendants-Appellants (hereafter "City") in the above-entitled action, hereby requests, pursuant to Rule 21(d) of the Rules of the United States Court of Appeal for the Ninth Circuit, that the unpublished disposition of the above-entitled case by Memorandum filed May 14, 1985 (hereafter "Memorandum") be published in the Federal Reporter. The City contends that the Memorandum meets several of the criteria set forth in Rule 21(b), and that therefore the Memorandum must be published.

Under Rule 21(b), Opinions are to be published if *any* of the six criteria are met. Because there is no separate or concurring opinion, Rule 21(b)(6) does not apply. However, the other five criteria set forth in Rule 21(b) apply, as follows:

The Memorandum Establishes, Alters, Modifies Rules of Law (Rule 21(b)(1)) and Criticizes Existing Law (Rule (21b)(3)).

The Memorandum establishes an important rule of law in the Ninth Circuit. Prior appellate authority provided that zoning ordinances regulating first amendment activities are unconstitutional if "a

motivating reason" for its adoption was "to suppress protected expression." (*Tovar v. Billmeyer* (9th Cir. 1983) 721 F.2d 1260, *cert denied* 105 S.Ct. 223.) According to the Memorandum, where such a motivating factor exists, the defect can *never* be remedied (Memorandum, pp.9-10). Thus, the Memorandum establishes a new legal rule: once a court has found a municipal zoning ordinance regulating a First Amendment activity unconstitutional, the municipality must forever abandon any attempt to regulate that activity.

The Memorandum also establishes a new legal proposition: impermissible motive exists where statements of a staff member of the City are made subsequent to the ordinance's enactment expressing the *staff member's opinion* but not that of a legislator.

Finally, the Memorandum criticizes existing law and alters and modifies it on the subject of the calculation of attorneys' fees. The Memorandum states that:

> "This court has declined to endorse the 'lodestar approach' used in other circuits under which, absence special circumstances, the starting figure for an hourly rate should be 'counsel's normal billing rate.' *Moore*, 682 F.2d at 840. Instead it adheres to a list of 12 factors for determining the fee award as a whole" (Memorandum, p. 10, lines 8-22 (citations omitted).)

However, the Court in *Moore v. James J. H. Matthews & Co.* (9th Cir. 1982) 682 F.2d 830, adopted the "blended" approach to the calculation of attorneys' fees. This approach employs *both* the "lodestar approach" and the 12 *Kerr* factors.

In *Moore*, the Court stated:

> "We note with approval the district courts in this circuit have increasingly responded to perceived flaws in the *Kerr* and lodestar approaches by blending the best features of the two approaches. [Citations.] This court recently upheld a fee award calculated with a blend of lodestar and *Kerr* analysis.
>
> ***
>
> "We believe that the blended approach is well suited . . . for use in calculating the fee award on remand." (*Id.* at 840-41.)

Moreover, the Memorandum alters and modifies the rule for awarding attorneys' fees set out by this Circuit in *Sealy, Inc. v. Easy Living, Inc.* (9th Cir. 1984) 743 F.2d 1378. As in the instant case, the *Sealy* court stated that the "[a]ward of attorneys' fees is in the discretion of the district court, and we will not disturb an award unless the district court has abused its discretion." (*Id.* at 1384.) However, the decision of the *Sealy* court differs from the decision in the instant case regarding the burden of producing evidence and the necessity for an adequate record.

In *Sealy*, as in this case, the Court was presented with Findings which the District Court had ordered prepared by the prevailing party (i.e., by the "winning lawyers", *Sealy*, p. 1385, n.3). The Court in *Sealy*, found that this "regretable practice" required that the Findings be reviewed with "special scrutiny." (*Id.* at 1385, n.3.) In the instant case, the Memorandum does not give *any* "special scrutiny" to the Findings. In fact the Memorandum states that it is the City's burden to rebut those Findings. This is contrary to the rule in *Sealy* that the record must present "adequate review of the factors upon which the district court based its decision." (*Id.*) The

Sealy court held that where the trial court uncritically accepts representations concerning the time expended on the case and then awards the entire amount requested, this is inappropriate. (*Id.*) However, this is the exact procedure which was adopted by the trial court in the instant case, and approved by the Memorandum. Therefore, the Memorandum alters or modifies existing law.

The Memorandum Calls Attention to a Generally Overlooked Rule of Law (Rule 21(b)(2)).

On the issue of res judicata, the Court relies upon the decision of the United States Supreme Court in *Aurora City v. West* (1868) 74 U.S. (7 Wall.) 82. There can be no question but that reliance upon a case decided 117 years ago calls attention to a "generally overlooked" rule of law.

The Case Involves Issues of "Unique Interest" and "Substantial Public Importance" (Rule 21(b)(4)).

This case involves the basic question of: To what extent may a public entity regulate a "First Amendment activity?" There are 436 cities and 58 counties in California, most of which have in place adult business zoning regulations either requiring dispersal, as in the instant case, or requiring a concentration of adult businesses. The constitutionality of all of these ordinances is affected by the disposition of this case.

That this matter is of considerable importance cannot be denied, especially in view of the fact that the United States Supreme Court has noted probable jurisdiction in *City of Renton v. Playtime Theaters* (No. 84-1360, opinion below, 748 F.2d 527 (9th Cir. 1984)). That case involves many facts and circumstances identical to the instant case. Prior to the issuance of the Memorandum, the City, by letter, had requested that the panel defer

resolution of this case pending action by the United States Supreme Court in the *Renton* case; that request was refused.

Finally, the Court's determination has the effect of invalidating a "state" enactment, which is in itself of substantial public importance within the meaning of Rule 21(b)(4).

The Court Decided a Case in Which There is Another Published Opinion (Rule 21(b)(5)).

Rule 21(b)(5) provides for publication where there is "a published opinion by a lower court or adminstrative agency . . ." This provision is seemingly broad enough to cover the situation in the instant case, where although there is no published opinion by the Federal District Court, a published opinion exists of a California court.

The constitutionality of the City's adult business zoning ordinances was also the subject of a published opinion of the California Court of Appeal (*City of Whittier v. Walnut Properties, Inc.* (1983) 149 Cal.App.3d 637). That opinion found the ordinances constitutional. Without publication of the Memorandum, the validity of this ordinance and other similar ordinances will remain unclear and thus in doubt.

Rule 21(b) provides that dispositions "shall" be published if any one of the criteria set forth in the Rule are met. In this case, five of six of the criteria of the Rule are met. Therefore, the City respectfully requests that the final disposition in this matter be redesignated and published as an Opinion.

Very truly yours,

J. ROBERT FLANDRICK
of BURKE, WILLIAMS & SORENSEN

cc:

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 18 1985

CLERK, U.S. COURT OF APPEALS

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual, Plaintiffs-Appellees, v. CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier, Defendants-Appellants.	)	Nos. 84-5755, 84-6087 D.C. No. CV 81-2262-R **ORDER**

On appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,* District Judge.

Appellant's request for publication is denied.

* Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 28, 1986, I served the within *Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 28, 1986, at Los Angeles, California.

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